ASIA COMMERCIAL FINANCE (M) BERHAD v. BANK BUMIPUTRA MALAYSIA BERHAD & ORS.

[O.C.J. (Zakaria Yatim J.) May 13, 1987]

[Kuala Lumpur – Civil Suit No. C1248 of 1985]

Civil Procedure – Judgment in default of appearance – Setting aside – Application for – Whether non-compliance with Legal Profession (Practice and Etiquette) Rules 1978 makes judgment irregular – Non-compliance with Rules of High Court, 1980 – Whether judgment irregular – Legal Profession (Practice and Etiquette) Rules 1978, r.56 – R.H.C. 1980, O.18.

Legal Profession – Legal Profession (Practice and Etiquette) Rules 1978 – Non-compliance with Rules – Whether judgment in default of appearance regular.

In this application, the first defendant sought to set aside a judgment obtained in default of defence entered against him on August 17, 1985.

There were two grounds on which the first defendant sought to set aside the judgment. First, the first defendant contended that the plaintiff did not comply with rule 56 of the Legal Profession (Practice and Etiquette) Rules 1978 ("Practice and Etiquette Rules 1978"). It was submitted that the Practice and Etiquette Rules 1978 have the force of law and where there was a mandatory prohibition as contained in rule 56, any judgment entered without complying with the rule would be irregular.

Secondly, it was also argued that the judgment in default had been entered one day short of the fourteen-day period as provided in Order 16, rule 2(1) of the Rules of the High Court, 1980. It was also submitted that the eight days required for entering appearance did not include the day of service.

Held: (1) the Practice and Etiquette Rules 1978 only regulate the professional practice, etiquette, conduct and discipline of an advocate and solicitor. The Rules do not regulate the procedure of legal proceedings in the High Court. The Bar Council has no power under the Legal Profession Act to make rules to regulate the procedure of legal proceedings;

(2) non-compliance with rule 56 of the Practice and Etiquette Rules 1978 does not render the judgment in default of defence irregular. Under Order 2, rule 1 of the Rules of the High Court, only failure to comply with the Rules of the High Court shall be treated as an irregularity. Judgment in default of defence is only an irregular judgment if the plaintiff, in obtaining the judgment, failed to comply with the Rules of the High Court;

(3) the eight days include the day of service. The judgment in default was therefore entered upon the expiry of fourteen days;

(4) the judgment entered in default of defence was a regular judgment.

Cases referred to:

(1) *Re S. Fung, A Solicitor* [1941] M.L.J. 173.
(2) *Re Lim Keng Kooi, An Advocate and Solicitor* [1941] M.L.J. 217.

APPLICATION.

K. H. Chan for the plaintiff.
V.N. Kumar for the first defendant.

Cur. Adv. Vult.

Zakaria Yatim J.: This is an application by the first defendant for an order that judgment in default of defence entered against the first defendant on August 17, 1985 be set aside and the costs of the application be costs in the cause.

Mr. V.N. Kumar, counsel for the first defendant, submitted that the judgment entered against the first defendant was an irregular judgment. His ground for saying that the judgment was irregular was that the plaintiff had not complied with Rule 56 of the Legal Profession (Practice and Etiquette) Rules 1978 (hereinafter referred to as "Practice and Etiquette Rules 1978"). According to Mr. Kumar the plaintiff did not deny that it had not complied with Rule 56. In his affidavit in support of the application, Mr. Kumar stated that his firm was appointed by the first defendant to act as solicitors and a memorandum of appearance was filed and served on the plaintiff's solicitors. Mr. Kumar submitted that the Practice and Etiquette Rules have the force of law and where there was a mandatory prohibition as contained in Rule 56, any judgment entered without complying with the Rule would be irregular.

Rule 56 states:

"Where the name of the advocate and solicitor or his firm appears on the Court record or the fact of representation is known to the other side, no advocate and solicitor representing the other party to the proceedings shall enter judgment by default against the client of the first-named advocate and solicitor or to take advantage of delay in pleading or filing documents in the nature of pleadings or in taking any necessary steps or in complying with any other in the proceedings by such first-named advocate and solicitor, unless he shall have given to such first-named advocate and solicitor written notice of his intention to do so, and forty-eight hours shall have elapsed after the delivery of such notice to the first-named advocate and solicitor."

It is not in dispute that the Practice and Etiquette Rules have the force of law. The Rules were made by the Bar Council in pursuance of the powers conferred upon it by section 77 of the Legal Profession Act, 1976. In *Re S. Fung, A Solicitor,*[1] the Court held that the Rules regulating the practice and etiquette of the Singapore Bar which had been made under section 31(1)(a) of the Advocates and Solicitors Ordinance had the force of law.

The question to be considered here is whether non-compliance with Rule 56 renders the judgment obtained in default of defence an irregular judgment.

The Practice and Etiquette Rules, 1978 were made by the Bar Council for the purpose of "regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors." See section 77(1) of the Legal Profession Act. Sub-section (3) of section 77 of the Act states that any advocate and solicitor who fails to comply with the said Rules may be liable for disciplinary proceedings.

In *Re S. Fung, A Solicitor, supra,* the respondent did not keep a separate client's account with a bank as required by the Rules regulating the practice and etiquette of the Singapore Bar made under section 31(1)(a) of the Advocates and Solicitors Ordinance. The Court found that the conduct of the respondent was in breach of the Rules and ordered that he be suspended from practice for a period of nine months.

In *Re Lim Keng Kooi, An Advocate and Solicitor,*[2] the respondent did not keep a separate client's account with a bank as required by Rule 10 of the Penang Bar Committee Rules regulating the practice and etiquette of the Penang Bar made under section 31 of the Advocates and Solicitors Ordinance. The Court held that the respondent had been guilty of grossly improper conduct.

In my opinion, the Practice and Etiquette Rules, 1978 only regulate the professional practice, etiquette, conduct and discipline of an advocate and solicitor. The Rules do not regulate the procedure of legal proceedings in the High Court. Indeed, the Bar Council has no power under the Legal Profession Act to make rules to regulate procedure of legal proceedings.

The rules regulating and prescribing the procedure and practice to be followed by the High Court are found in the Rules of the High Court 1980. These rules were made by the Rules Committee under powers conferred upon it by section 17 of the Courts of Judicature Act 1964. Order 1 Rule 2(1) of the Rules of the High Court explicitly states that "these rules shall have effect in relation to all proceedings in the High Court ..."

It is clear, therefore, that non-compliance with Rule 56 of the Practice and Etiquette Rules, 1978 does not render the judgment in default of defence, as in the instant case, irregular. Under Order 2 Rule 1 of the Rules of the High Court, only failure to comply with the Rules of the High Court shall be treated as an irregularity. In other words judgment in default of defence is only an irregular judgment if the plaintiff, in obtaining the judgment, failed to comply with the rules of the High Court.

Mr. Kumar in his affidavit stated that judgment in default obtained on August 17, 1985 was irregular as it was not in compliance with Order 18 Rule 2(1) as the plaintiff filed for judgment on the fourteenth day and not upon the expiry of the fourteenth day. Order 18 Rule 2(1) states that a defendant who enters an appearance in, and intends to defend, an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of fourteen days after the time limit for appearing or after the statement of claim is served on him, whichever is the later. Under Order 12 Rule 4(a) the time limit for entering appearance in the instant case is eight days. According to Mr. Kumar the eight days did not include the day of service. It was, therefore, his contention that the judgment in default had been entered one day short of the fourteen-day period as provided in Order 18 Rule 2(1).

According to the affidavit of service filed by the plaintiff, the writ was served on the first defendant on July 26, 1985. If the eight days did not include the day of service then Mr. Kumar was right and the plaintiff had failed to comply with the time requirement and the judgment would be irregular.

In order to ascertain this question it is necessary to examine what the Rule provides. Order 12 Rule 4 states:

> "References in these rules to the time limited for appearing are references –
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> (a) in the case of a writ served within the local jurisdiction of each High Court in Malaya, to 8 days and served outside such local jurisdiction but within the jurisdiction of Malaya, to 12 days after service of the writ (including the day of service) or, where that time has been extended by or by virtue of these rules, to that time as to extended; and
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> (b) in the case of a writ served within Sarawak or Sabah, to 10 days after service of the writ (including the day of service) or in the case of a defendant whose place of residence or if an incorporated society whose registered office of business is not within the Division

or Residency in which is situated the Registry out of which the writ of summons was issued, 20 days after service of the writ (including the day of service);"

In my view the words in brackets, "including the day of service", in Rule 4(a) above refer to both the eight days and the ten days mentioned in the Rule. Order 6 Rule 1 provides that every writ must be in Form 2 or 3 whichever is appropriate. It will be noted that Form 2 states:

"We command you that within eight days after the service of this writ on you, *inclusive of the day of such service*, you do cause an appearance to be entered ..." [Emphasis added].

Form 2 which is provided in Appendix A of the Rules of the High Court is part of the Rules and has the same force and validity as the Rules themselves: *Mallal's Supreme Court Practice*, 2nd. Edn. v.1 page 7.

It is clear that the eight days include the day of service. The judgment in default was, therefore, entered upon the expiry of fourteen days.

For the reasons stated above, the judgment entered in default of defence was a regular judgment.

Order accordingly.

Solicitors: *Khaw & Hussein; Albar, Zulkifly & Yap.*

LIM KIT SIANG v. UNITED ENGINEERS (M) BHD. & 3 ORS.

[O.C.J. (Edgar Joseph Jr. J.) August 18, 1987]

[Penang – Civil Suit No. 21-55-87]

Civil Procedure – Interlocutory prohibitory injunction – Application for – Merits of application – Application against Government – Application against public interest – Injunction causing maximum disruption – Government Proceedings Ordinance, 1956, s.29.

A suit was brought by Lim Kit Siang, a member of Parliament and leader of the Opposition in the Dewan Rakyat, against United Engineers (M) Bhd., the first defendant, the Finance Minister, the second defendant, the Minister of Works, Malaysia, the third defendant and the Government of Malaysia the fourth defendant. In his statement of claim, the plaintiff alleged, *inter alia*, that a contract for the construction and maintenance of certain roads in Malaysia was illegally and unfairly awarded to the first defendant through the hands of the second, third and fourth defendants.

The present application was brought by the plaintiff seeking an interlocutory prohibitory injunction restraining United Engineers (M) Bhd., by itself or through its agents and/or servants, from signing the proposed contract.

Held: (1) the court was satisfied that if the application was granted, it would operate in substance and effect as an injunction against the Government of Malaysia, the fourth defendant. Section 29 of the Government Proceedings Ordinance 1956 also posed an insuperable obstacle in the way of the plaintiff;

(2) the grant of the injunction would also impugn the powers of the Government of Malaysia to enter into contracts. Therefore, it would be against public interest to grant the injunction;

(3) there was also no evidence that the contract was illegal;

(4) the effect of granting the application at this late stage when preparations must have reached a very advanced stage must surely be to cause maximum disruption;

(5) in all these circumstances the application was dismissed.

[*Editorial Note:* The plaintiff appealed to the Supreme Court. In an oral judgment, the Supreme Court allowed the appeal. The transcript of the oral judgment is quoted *in extenso* by V.C. George J. in *Lim Kit Siang* v. *United Engineers (M) Bhd. & Ors. (No. 2)* (see post p. 50 at p. 53).

Cases referred to:

(1) *Pickwick International Inc (GB) Ltd.* v. *Multiple Sound Distributors Ltd.* [1972] 1 W.L.R. 1213.
(2) *American Cyanamid* v. *Ethicon* [1975] 1 All E.R. 504.
(3) *Smith* v. *Ilea* [1978] 1 All E.R. 411.
(4) *Morning Star Co-operative Ltd.* v. *Express Newspapers Ltd.* [1979] F.S.R. 113.

CIVIL SUIT.

Karpal Singh (*N. Shanmugam* with him) for the plaintiff.

Dato' Mohd. Saari bin Yusoff (State Legal Adviser) for the second, third and fourth defendants.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: Earlier this evening, I dismissed this application for an interlocutory prohibitory injunction restraining United Engineers (M) Berhad ("U.E."), the first defendant herein, by itself or through its agents and/or servants, from signing the proposed contract pursuant to the Letter of Intent for the privatisation of the North-South Interurban Toll Expressway. I shall now proceed to give my reasons for that decision.